No. SC92252

# In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ELTON NORFOLK,

Appellant.

Appeal from St. Louis City County Circuit Court
Twenty-Second Judicial Circuit
The Honorable Donald L. McCullin, Judge

## RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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## STATEMENT OF FACTS

Appellant, Elton Norfolk, was charged in the Circuit Court of the City of St. Louis with one count of unlawful use of a weapon, § 571.030,[1] one count of possession of marijuana, § 195.202, and one count of third degree assault of a law enforcement officer, § 565.083. (L.F. 14-15).[2] He knowingly waived his right to a jury trial. (L.F. 3, 28). Viewed in the light most favorable to the verdict, the following evidence was adduced at his bench trial before the Honorable Donald L. McCullin:

On the evening of August 18, 2009, Officer Julie Reynolds was patrolling the 3900 block of Lexington in St. Louis, an area known for a high number of robberies, when her attention was drawn to Appellant, who was standing on a corner. (Tr. 22-23). She saw Appellant grab his waistband in a manner that made her believe that he was concealing a weapon. (Tr. 23). He then went into a store, and Officer Reynolds followed him. (Tr. 23). Officer Reynolds brought Appellant out of the store and asked him to raise his hands so that she could perform a pat-down search on him. (Tr. 23). As his hands

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[1] Unless otherwise noted, all statutory references are to RSMo 2000.

[2] The record on appeal consists of a legal file (L.F.) and a transcript (Tr.). Respondent will also be referring to Appellant's brief that he filed with the Court of Appeals (Ct.App.Br.).

came up, she saw the butt of a gun under his shirt. (Tr. 23-24). Appellant pushed Officer Reynolds away. (Tr. 24). Believing that Appellant was attempting to retrieve his gun, Officer Reynolds drew her gun and radioed for backup. (Tr. 24). Other officers were already in the area, and they arrived a few seconds later. (Tr. 24-25). They placed Appellant in handcuffs. (Tr. 25).

Officer Reynolds advised one of the other officers that she had seen a weapon on Appellant. (Tr. 25). The officer retrieved the gun from Appellant's waistband and handed it to Officer Reynolds. (Tr. 25). Inside the gun was a magazine containing live cartridges. (Tr. 27).

The officers placed Appellant under arrest. (Tr. 28). Officer Reynolds conducted a pat-down search of Appellant. (Tr. 28-29). She felt "some objects" in his pocket, which turned out to be three small baggies of marijuana. (Tr. 29).

Appellant testified at trial. (Tr. 39). He admitted on cross-examination that at the time of his encounter with Officer Reynolds he possessed a gun and had marijuana in his pocket. (Tr. 43).

The trial court, sitting as the finder of fact, convicted Appellant of unlawful use of a weapon and possession of marijuana, but acquitted him of assault of a law enforcement officer. (Tr. 59). The Court sentenced him to concurrent terms of three years imprisonment on the weapon count and one year in jail on the possession count. (L.F. 36). The Missouri Court of

Appeals, Eastern District, affirmed his conviction in *State v. Norfolk*, 2011 WL 5541791 (Mo.App.E.D. November 15, 2011). This Court granted Appellant's motion for transfer.

## ARGUMENT

### Point I

**The trial court did not err, plainly or otherwise, in admitting into evidence the handgun, the marijuana, and the testimony about these items.**

### A. Additional Facts

*Appellant's motion to suppress and the suppression hearing*

Appellant filed a motion to suppress the handgun, the marijuana, and all related testimony on the ground that they were the fruit of an unlawful search. (L.F. 23). He claimed that the search was conducted pursuant to an illegal stop. (L.F. 24). The court conducted a suppression hearing on the matter. (Tr. 1). Viewing the evidence from both the suppression hearing and the trial in the light most favorable to the verdict, *State v. Pike*, 162 S.W.3d 464, 473 (Mo.banc 2005), the following events took place:

On the evening of August 18, 2009, Officer Julie Reynolds was patrolling the 3900 block of Lexington in response to reports of robberies in the area. (Tr. 2-3, 22). She was traveling in a marked patrol car, going south on Vandeventer. (Tr. 3). As she passed Lexington, she saw Appellant standing on the corner. (Tr. 3, 7, 23). They made eye contact with each other, and Officer Reynolds saw Appellant adjust his pants in a manner that she believed indicated, based on her experience, that he was concealing a

weapon. (Tr. 3, 4, 23). She had passed Lexington by this point, so she turned around and parked her vehicle in front of a store. (Tr. 4).

As Officer Reynolds exited her vehicle, Appellant walked inside the store. (Tr. 4, 23). Officer Reynolds followed and, once inside, she asked Appellant, "Will you come outside and speak with me?" (Tr. 5). Appellant replied, "Fuck you. I don't need to speak to you." (Tr. 5). As Appellant was saying this, he was "walking towards [Officer Reynolds] and coming out of the store." (Tr. 5-6). Officer Reynolds responded, "If you're not doing anything wrong, you'll come outside and you'll speak with me." (Tr. 5).

After they both exited the store, Officer Reynolds had Appellant turn around and place his hands on a wall for her safety, so she could perform a pat-down search on him. (Tr. 6, 11, 12, 14, 23). As Appellant raised his hands onto the wall, Appellant's shirt came up slightly, and Officer Reynolds saw the butt of a gun sticking out of his pants. (Tr. 6, 23-24). In response, she placed her hand on Appellant's back. (Tr. 6, 24). Appellant, in turn, pushed her away with his right arm, and Officer Reynolds retrieved her weapon for her safety, believing that Appellant was attempting to grab his gun. (Tr. 6-7, 24). She called for backup, which arrived "[w]ithin a few seconds." (Tr. 24). The assisting officers handcuffed Appellant and removed the gun from his waistband. (Tr. 25). Officer Reynolds then conducted a

search incident to arrest on Appellant and discovered three baggies of marijuana in his pocket. (Tr. 28-29).

The trial court denied the motion to suppress. (Tr. 19). At trial, defense counsel objected to the introduction of both the handgun and the marijuana on the basis of the motion to suppress (Tr. 26-30), but did not object to Officer Reynolds's testimony about the gun and the marijuana. (Tr. 23-24, 28-29).

*The assault of a law enforcement officer charge, trial testimony, and Appellant's admissions on cross-examination*

Appellant took the stand at trial in order to refute the assault of a law enforcement charge and to respond to Officer Reynold's testimony about him pushing her away, which was the basis of the assault charge. (Tr. 40-41; L.F. 15). He claimed that at the time of the events in question, he was inside the store looking out the window when he saw "a guy take off running off the corner of Lexington." (Tr. 39-40). He declared that he then saw Officer Reynolds park her car in the middle of the street and get out of the car. (Tr. 40). Appellant continued:

> A . . . I thought [Officer Reynolds] was going to flee the guy on the corner that took off running up the street, but she walked in the store.
>
> Q What did she do once she got in the store?

A She opened the door and she had a yellow and black taser gun in her hand and she was holding the door open with her foot, and she told me to come here, and I asked her why. Why what did I do?

Q Okay. And what did you do then?

A I walked towards her. As soon as I got outside she told me to put my hands up and put them on the wall.

Q Did you do that?

A Yes.

Q Did she ask you to put your hands up or did she tell you?

A Well, she was pretty forceful. She was telling me to put my hands up. The only thing she asked me was to come here, and I did. So she told me to put my hands up, basically, yeah, and I did.

Q At that point, what did you do?

A Well, I put my hands up, and she searched me.

Q Did you push her?

A No, not at all.

Q Why not?

A I had – I had a boot on my foot so I was already at risk. I didn't want to risk any further injury to myself or my life . . . .

(Tr. 40-41). At no time during direct examination did Appellant testify about the weapons charge or the drug charge.

On cross-examination, the following exchange took place between Appellant and the State:

Q But this entire time, you did have a gun on you, right?

A Yes.

Q Yes. And you did have weed in your pocket?

A Yes.

(Tr. 43).

The trial court acquitted Appellant of the assault charge. (Tr. 59).

**B. Standard of Review**

Insofar as it applies to Appellant's claim that the trial court erred in admitting the gun and the marijuana, review of the trial court's ruling on the motion to suppress is for clear error. *State v. Boykins*, 306 S.W.3d 626, 627 (Mo.App.E.D. 2010). The reviewing court views the evidence and the inferences in the light most favorable to the lower court's ruling, discarding all contrary inferences and deferring to the trial court's findings of fact and determinations of credibility. *State v. Waldrup*, 331 S.W.3d 668, 672 (Mo.banc 2011). "Whether conduct violates the Fourth Amendment is an issue of law that [the reviewing court] reviews *de novo*." *State v. Ross*, 254 S.W.3d 267, 273 (Mo.App.E.D. 2008).

While the above portion of Appellant's claim is preserved for review, Appellant has not preserved for review his claim that the trial court erred in admitting Officer Reynolds's testimony about the gun and the marijuana into evidence. At no time did Appellant object to this testimony at trial. (Tr. 23-24, 28-29). The failure to object to evidence at the earliest possible time at trial waives the claim for review. *State v. Philips*, 319 S.W.3d 471, 476 (Mo.App.S.D. 2010). At most, this portion of Appellant's claim is reviewable for plain error. Rule 30.20. Appellant will prevail on plain error review only if the lower court's alleged mistake was so grievous as to result in a miscarriage of justice or manifest injustice. *State v. Holden*, 278 S.W.3d 674, 680-681 (Mo.banc 2009).

Appellant not only did not object to Officer Reynolds's testimony at trial, but also failed to raise this claim in his brief before the Court of Appeals. (Ct.App.Br. 8). Appellant only raises this claim now, for the first time, in his substitute brief. (App.Br. 10). Rule 83.08(b) states that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Rule 83.08(b). Accordingly, this Court may decline to consider that part of Appellant's argument claiming that Officer McReynolds's testimony about the gun and the marijuana was the fruit of the poisonous tree. *See Linzenni v. Hoffman*, 937 S.W.2d 723, 726-727 (Mo.banc 1997) (declining to review issues not raised before the Court of Appeals).

**C. Analysis**

The trial court did not clearly err in denying Appellant's motion to suppress the physical evidence of marijuana, the weapon, and the ammunition and in admitting them into evidence. The gun was not the fruit of an illegal search in that Officer Reynolds had reasonable suspicion to believe that Appellant was unlawfully carrying a weapon, given his attempts to conceal it from her. The marijuana, also was not the fruit of an illegal search because it was discovered pursuant to a search incident to arrest based on Appellant's arrest for assaulting Officer Reynolds, *i.e.*, either there was an independent source for discovering the marijuana, or its discovery was sufficiently attenuated from any illegal search or seizure.

While warrantless seizures are, in general, unconstitutional, an exception to this is the *Terry* stop.[3] This "permit[s] officers to make a brief, investigatory stop if they are able to point to specific articulable facts that, taken together with rational inferences from those facts, supports [sic] a reasonable suspicion that illegal activity has occurred or is occurring." *Waldrup*, 331 S.W.3d at 672 (internal quotation marks omitted). Having made such a stop, officers may then pat down the outer clothing of the suspect for weapons, so long as they have observed the suspect engaging in

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[3] *See Terry v. Ohio*, 391 U.S. 1 (1968).

unusual conduct that, in light of their experience, leads them to conclude that the suspect may be armed and dangerous. *State v. Goff*, 129 S.W.3d 857, 864-865 (Mo.banc 2004). Courts employ an objective standard, inquiring whether a hypothetical officer in the same circumstances would have reasonably believed that the individual was armed and dangerous. *Id.* at 865.

Here, an objective police officer would have had reasonable suspicion to suspect that Appellant was in illegal possession of a firearm. Officer Reynolds was patrolling, late in the evening, an area known for criminal activity, specifically robberies. (Tr. 2-3). As she drove by Appellant, they made eye contact, and in response Appellant grabbed his waistband in a manner that caused Officer Reynolds to believe, based on her experience, that he was concealing a weapon. (Tr. 3, 4, 23). When she asked him if she could speak with him, he refused with an expletive and started to walk away. (Tr. 5-6). All of these circumstances, taken together, gave Officer Reynolds reasonable suspicion to conduct a *Terry* stop.

The present case is similar to *United States v. Maher*, 145 F.3d 907 (7th Cir. 1998), in which the defendant was convicted of possessing a firearm as a convicted felon. *Id.* at 908. There, an officer was dispatched to a block in response to a report of gunshots. *Id.* While the officer was traveling south in his patrol car, he saw two individuals walking towards him in the middle of the street. *Id.* One of the individuals walked to the west side of the street,

between some houses, while the other individual, the defendant, moved to the sidewalk. *Id.* The officer noticed that the defendant was holding his right, front pants pocket. *Id.* The officer exited the patrol vehicle, approached the defendant, and asked him if he knew anything about the report of gunshots. *Id.* The defendant replied that he had heard the gunshots and that his mother had called the police. *Id.*

The officer then told the defendant, "Why don't you come over here so I can pat you down for a weapon real quick." *Id.* The defendant ran away. *Id.* The officer gave chase and eventually apprehended the defendant at his house, tackling and handcuffing him. *Id.* He started to pat down the defendant, but then the defendant's father approached and retrieved a firearm from the defendant's front pants pocket. *Id.*

The 7th Circuit ruled that the officer was justified in making an investigatory detention of the defendant. *Id.* It noted that the officer had testified that the area that he had been patrolling was known for previous gunfire occurrences, that the defendant had seemed nervous and was clutching his front pants as he approached the patrol car, and that the defendant fled in order to avoid a pat-down search. *Id.* The court held that the officer had a reasonable suspicion that criminal activity was afoot. *Id.*

Similar to *Maher*, here the officer was patrolling a high-crime area. (Tr. 2-3). When Officer Reynolds made eye contact with Appellant, he

grabbed his waistband, indicating that he was concealing something. (Tr. 3, 4, 23). Just as the officer in *Maher* approached the defendant and asked to speak with him, *id*. at 908, here Officer Reynolds asked to speak with Appellant. (Tr. 5-6). Both Appellant and the defendant in *Maher* refused to speak with the police and left or attempted to leave. *Id*. (Tr. 5-6). Thus, Officer Reynolds had reasonable suspicion to briefly detain Appellant, and once she saw his gun, the seizure of the gun and the marijuana was valid.

But even if the *Terry* stop was invalid, at most this would affect the admissibility of the gun only, not the marijuana. This is because the marijuana was seized pursuant to a search incident to arrest for a crime that Officer Reynolds had probable cause to believe Appellant had committed, namely, assault or resisting a stop. As such, the marijuana was not the fruit of the poisonous tree. Even if Officer Reynolds's initial *Terry* stop was invalid, Appellant's subsequent action of pushing her away with his hand provided her with probable cause to arrest him for assaulting a law enforcement officer or resisting a stop. *See State v. Haynes*, 158 S.W.3d 918, 919 (Mo.App.W.D. 2005) (noting that the defendant resisted arrest by pulling his hands away from the officers and subsequently pushing the officers away when they took him to the patrol car). That the *Terry* stop might have been invalid did not give Appellant the right to resist or assault Officer Reynolds. *See State v. Miller*, 172 S.W.3d 838, 851 (Mo.App.S.D. 2005) (ruling that it is

not a defense to the charge of resisting arrest that the officer was making an unlawful arrest); *State v. Trimble*, 638 S.W.2d 726, 733 (Mo.banc 1982) (holding the same).

Armed with probable cause to effect an arrest, Officer Reynolds conducted a search incident to that arrest, and it was only at that point that she discovered the marijuana. (Tr. 29). This made the marijuana admissible under either the independent source doctrine or the attenuation doctrine. Under the independent source doctrine, the exclusionary rule does not apply to evidence obtained from a source independent of the unlawful police conduct. *Segura v. United States*, 468 U.S. 796, 805 (1984). In *Segura*, police unlawfully entered into a residence. *Id.* at 800-801. They remained in the apartment for 19 hours, until they obtained a valid search warrant. *Id.* at 800-801. The Court ruled that evidence seized pursuant to the search warrant was admissible because none of the information used to obtain the search warrant was the result of the unlawful entry. *Id.* at 814. Similarly, here the marijuana was derived from Officer Reynolds's lawful search incident to arrest that she conducted on Appellant after he pushed her.

Alternatively, the marijuana was admissible under the attenuation doctrine. Under this doctrine, "the evidence still may be admitted at trial if the connection between the evidence and the constitutional violation was so attenuated as to dissipate the taint." *State v. Grayson*, 336 S.W.3d 138, 147

(Mo.banc 2011) (internal quotation marks omitted). Here, the intervening circumstance of Appellant's attempted assault or resisting arrest was an intervening event that purged any taint that the seized marijuana may have possessed, rendering it admissible.

*Any error in the admission of the fruits of the search was harmless*

If, in fact, there was insufficient to provide Officer Reynolds with reasonable suspicion to conduct a *Terry* stop on Appellant, then the gun, and Officer Reynold's testimony were the fruit of the poisonous tree, since they arose out of the illegal stop. Again, the marijuana was admissible regardless of the *Terry* stop's validity, since that was seized pursuant to a valid search incident to arrest based on Appellant's assault of Officer Reynolds. But even if the trial court erred in admitting the gun, the marijuana, and Officer Reynolds's testimony, such error was harmless. It certainly could not rise to the level of plain error. This is because Appellant himself, on cross-examination, admitted to possessing both the gun and the marijuana.

A constitutional error does not require reversal if the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Harmless error is evaluated by reviewing the remaining evidence. *State v. Hill*, 247 S.W.3d 34, 42 (Mo.App.E.D. 2008). "The question a reviewing court must ask is this: absent the [trial] court's admission of the challenged evidence, is it clear beyond a reasonable doubt that the jury would

have returned a verdict of guilty?" *United States v. Hill*, 864 F.2d 601, 603 (8th Cir. 1988); (citing *United States v. Hastings*, 461 U.S. 499, 510-511 (1983))

"The erroneous admission of evidence which is merely cumulative, in the face of otherwise strong evidence of guilt, constitutes harmless error." *Id*. This is especially true where the defendant himself takes the stand and unequivocally admits to committing the charged crimes. "It would be trifling with the administration of the criminal law to award [a defendant] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Motes v. United States*, 178 U.S. 458, 476 (1900). This is because a confession "is not like other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

This Court followed this principle in *State v. McGee*, 447 S.W.2d 270 (Mo.banc 1969). There, the defendant was convicted of murdering his girlfriend. *Id*. at 271-272. The arresting officer testified that he advised the

defendant of the *Miranda*[4] warnings when he placed him under arrest at his residence, but the defendant never explicitly waived his rights. *Id*. at 273-274. The officer testified that the defendant had told him that he had come straight home from work, that the defendant was in his underclothing, and that the defendant told the officer that clothing on a nearby chair belonged to him. *Id*. at 274.

This Court ruled that the officer's testimony was inadmissible because the defendant had never explicitly waived his *Miranda* rights.[5] *Id*. at 275. But it also found that the admission of the evidence was harmless beyond a reasonable doubt under *Chapman*. *McGee*, 447 S.W.2d at 275. At trial, the defendant testified on direct examination that when the arresting officer came to the door, he told the officers that the victim was his girlfriend. *Id*. He also testified that he told the officers that clothing on a nearby chair belonged to him. *Id*. Following *Motes v. United States*, this Court held "that a defendant may not testify to facts, complained of as self-in-criminating [sic]

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[4] 384 U.S. 436 (1966)

[5] Since then, the United States Supreme Court has overruled this part of *Miranda*, holding that a defendant waives his right to remain silent if he does not explicitly invoke it. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2264 (2010).

when elicited by the prosecution, and then successfully assert that he has been deprived of a fair trial." *Id.*

The Eighth Circuit reached a similar conclusion in *United States v. Hill*. There, the defendant was convicted of two counts of possession of a firearm. 864 F.2d at 601. Officers conducted a warrantless search of the defendant's vehicle without probable cause and discovered a handgun and a rifle. *Id.* at 602. The day after his arrest, the defendant, having waived his *Miranda* rights, admitted to possessing both guns. *Id.* at 602. While he challenged the admissibility of the weapons, he did not challenge the admissibility of his confession to the police. The Eighth Circuit ruled that any error the trial court might have committed in admitting the weapons into evidence was harmless beyond a reasonable doubt. Applying *Chapman*, the court ruled, "In view of defendant's own admissions concerning the firearms at issue, any error in allowing the introduction of the guns themselves was harmless." *Id.* at 603.

Similar to the defendants in *McGee* and *Hill*, here Appellant explicitly admitted to possessing both the gun and the marijuana on cross-examination. (Tr. 43). This rendered any error that the trial court might have made in admitting the gun, the marijuana, and Officer Reynolds's testimony into evidence harmless beyond a reasonable doubt under the *Chapman* standard. 386 U.S. at 24.

Appellant disputes that the trial court's error was harmless. He claims, along with amici,[6] that in *Fahy v. Connecticut*, 375 U.S. 85 (1963), the United States Supreme Court departed from *Motes* and its language about a defendant being unable to claim error where he testifies and admits his crime. (App.Br. 19-21; Am.Br. 3-5). Under *Fahy*, Appellant continues, the trial court's admission of the gun, the marijuana, and Officer Reynolds's testimony was not harmless error because there was a reasonable probability that this evidence contributed to his conviction. (App.Br. 21). Appellant makes the additional argument that Appellant's testimony cannot be considered because the wrongly-admitted evidence induced him to testify. (App.Br. 23). Amici further develop this second argument,[7] relying on *Harrison v. United States*, 392 U.S. 219 (1968), as support. Respondent will address both of these arguments in turn.

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[6] The amici in this case consist of the Missouri Association of Defense Lawyers and the National Association of Defense Lawyers. (Am.Br. Cover Page).

[7] Amici do not discuss Appellant's first argument.

*Appellant's testimony, standing alone, rendered the wrongly-admitted evidence harmless error under* Fahy *and subsequent caselaw*

In *Fahy*, the defendant was convicted in a Connecticut state court of willful injury to a public building by painting black swastikas on a synagogue. 375 U.S. at 85, 86. Without probable cause, the police conducted a warrantless search of the defendant's garage and seized a paint brush and a can of paint. *Id*. at 87. After seizing the can and the brush, the police interviewed the defendant, who, aware that the police had obtained the paint and the brush from his garage, confessed to the crime. *Id*. at 89-90. Appellant testified and admitted to the crime, but only after the confession, the paint, and the brush were admitted into evidence. *Id*. at 91. Once on the stand, Appellant admitted to painting the swastikas on the synagogue, but "tried to establish that the nature of those acts was not within the scope of the felony statute under which the defendant[ ] had been charged." *Id*.

Anticipating its ruling in *Chapman* three years later, the *Fahy* court ruled that "[t]he question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87; *compare with Chapman*, 386 U.S. at 24 ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). Under this standard, the Court ruled that the admission of the paint and the brush could

not be harmless error because their seizure potentially induced his confession, and their admission at trial induced him to testify and claim that his conduct did not fall within the statute under which he was charged. *Fahy*, 375 U.S. at 90.

*Fahy* was a fact-specific case in which the Court declined to set out a general standard for harmless error review of a constitutional law violation. 375 U.S. at 86 ("On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' . . . ."). Nevertheless, when the Court did announce its harmless error standard in *Chapman*, it explicitly adopted *Fahy's* language. "There is little, if any, difference between our [standard] in *Fahy v. State of Connecticut* . . . and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

Seizing on this language, Appellant maintains that it is impossible that the admission of the gun, the marijuana, and Officer Reynolds's testimony was harmless beyond a reasonable doubt because "there is reasonable possibility that [such evidence] contributed to Appellant's convictions. Without the seized evidence and Officer Reynolds's testimony relating to the seizure of the evidence, the State would not have had a case against

Appellant." (App.Br. 21). Appellant seems to be suggesting that because the jury, in convicting Appellant, could have relied on evidence *in addition* to his testimony, it cannot be said that the error was harmless beyond a reasonable doubt.

Appellant's argument ignores the probative value of a confession. The Court recognized that confessions have a unique value and rejected Appellant's reading of *Chapman* in *Harrington v. California*, 395 U.S. 250 (1969). There, a defendant was convicted alongside three other men of attempted robbery and felony murder. *Id.* at 252, n. 1. The three other men had previously confessed and identified the defendant as having participated in the robbery. *Id.* at 252-253. At trial, all three men's confessions were admitted into evidence, but only one of them took the stand and was cross-examined. *Id.* at 252. In violation of *Bruton v. United States*, 391 U.S. 123 (1968),[8] the other two men whose confessions were admitted into evidence did not take the stand, and the defendant was not able to cross-examine them. *Harrington*, 395 U.S. at 252. The defendant, furthermore, "made statements

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[8] In *Bruton*, the Court ruled that a co-defendant's confession implicating the defendant could not be used against the defendant unless the defendant was able to cross-examine the defendant. 391 U.S. at 137.

which fell short of a confession but which placed him at the scene of the crime."[9] *Id.* at 252.

The Court ruled that any error in admitting the two men's confessions was harmless beyond a reasonable doubt. It ruled that apart from the confessions "the case against [the defendant] was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopted the . . . view . . . that a departure from constitutional procedures should result in automatic reversal, regardless of the weight of the evidence." *Id.* at 254. In reaching this conclusion, the Court acknowledged, but rejected the defendant's argument, which was similar to the argument Appellant now makes:

> It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the two non-testifying co-defendant's] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been

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[9] The Court's opinion does not indicate whether these "statements" came from an interview with the police or from the defendant's trial testimony.

> the probable impact of the two confessions on the mind of an average jury.

*Id*. at 254. Noting that the case against the defendant was not based on circumstantial evidence, the Court concluded that the error was harmless beyond a reasonable doubt. *Id*.

In light of *Harrington*, the trial court's admission of the gun, the marijuana, and Officer Reynolds's testimony was harmless beyond a reasonable doubt. When Appellant himself admitted at trial to possessing both the gun and the marijuana, he removed any possible doubt from the jurors' minds that he did, in fact, commit the crime. As the Eighth Circuit declared in *Hill*, "[t]he erroneous admission of evidence which is merely cumulative, in the face of otherwise strong evidence of guilt, constitutes harmless error." 864 F.2d at 603. In light of Appellant's own admission at trial of guilt, all of the remaining evidence against him was cumulative.

*Appellant's testimony did not respond to the erroneously-admitted evidence, and, thus, may be considered in deciding whether the admission of that evidence was harmless error.*

Turning to Appellant's second argument, he claims that his trial testimony was induced by the improper admission of the gun, the marijuana, and Officer Reynolds's testimony. (App.Br. 23). He claims that after the trial court failed to suppress the evidence, he "only had two options: tell the truth

or perjure himself about the weapon, cartridge, ammunition, and marijuana." (App.Br. 23). Appellant cites no authority for this proposition.[10] (App.Br. 23). Amici, however, further develop this argument, claiming that the United States Supreme Court in both *Fahy* and *Harrison v. United States*, 392 U.S. 219 (1968), held that it cannot be harmless error if the defendant's testimony was prompted by the inadmissible evidence, and that both of these cases abrogated *Motes*. (Am.Br. 3-5). But both cases are readily distinguishable from the present matter.

Amici note that in *Fahy*, the defendant only took the stand after the paint and the brush were admitted into evidence, and the Supreme Court ruled as a result that the defendant's admissions could not render harmless the erroneously-admitted evidence. (App.Br. 3-4). Amici claim that this represents a total departure from *Motes*'*s* holding that a defendant cannot claim prejudice from any trial court error if he takes the stand and admits to committing the crime. (App.Br. 3-4). This ignores the fact that the defendant in *Fahy* took the stand and admitted to painting the swastikas on the synagogue only because, recognizing how fatal the paint and the brush were against him, he believed he needed to claim that his actions were insufficient

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[10] Of course, Appellant also had the option of not testifying – which would have freed him from either admitting the crime or perjuring himself.

as a matter of law to convict him. 375 U.S. at 91. Here, by contrast, Appellant did not attempt to explain away his possession of the gun or the marijuana on direct examination. Instead, he simply admitted to possessing both when cross-examined by the State. (Tr. 43). This makes *Motes* fully applicable to Appellant's case.

A similar situation arose in *Harrison*. There, the defendant was on trial for felony murder. *Harrison*, 392 U.S. at 220. During the trial, the government introduced into evidence three confessions he had previously made while in police custody, declaring that he had gone to the victim's house to rob him and that the victim had been killed while resisting the defendant's entry into his house. *Id*. at 220-221. In response, the defendant took the stand and claimed that he had gone to the victim's house hoping to pawn a shotgun, and that the victim was accidentally killed while the defendant was showing him the gun. *Id*. at 221. The Court of Appeals found that his three confessions were involuntary and remanded for a new trial. *Id*. During the retrial, the government read the defendant's prior trial testimony into the record. *Id*. The jury convicted the defendant. *Id*.

The Supreme Court ruled that the defendant's trial testimony, in which he admitted to being at the crime scene with the shotgun, was inadmissible as fruit of the poisonous tree. *Id*. at 222. It further held that in such a situation where a defendant testifies after a confession is improperly

admitted into evidence, "the Government must show that its illegal action did not induce [the defendant's] testimony." *Id*. at 225. The Court concluded that the Government had failed to make such a showing, noting that in his opening statement, defense counsel told the jury that the defendant would not be testifying. *Id*. at 225. "Only after his confessions had been admitted in evidence did he take the stand. It thus appears that, but for the use of his confessions, the petitioner might not have testified at all." *Id*.

This Court had the opportunity to apply *Harrison* in *State v. Eacret*, 456 S.W.2d 324 (Mo. 1970). There, the defendant was convicted of second degree burglary. *Id*. at 325. He filed a motion to suppress all property obtained by the police in their investigation of the burglary, which the trial court denied. *Id*. at 325-326. This Court ruled that any error that the trial court might have committed in admitting the evidence was harmless because the "defendant took the witness stand with the consent of his counsel . . . and he admitted under oath that he was guilty of the offense charged." *Id*. at 326. It distinguished the matter from *Harrison* by noting that in *Harrison,* the prosecution had not overcome the presumption that the wrongfully-admitted evidence had induced the defendant to testify. *Id*. at 327. But that was not the case, this Court continued, with the matter then before it:

> Unlike the testimony of the accused in the *Harrison* case in which there was no admission of the commission of the crime, the

> defendant in this case judicially admitted his guilt. Therefore, he could not have taken the witness stand, as the court found in accused did in the *Harrison* case, 'to overcome the impact of (evidence) illegally obtained' when, in fact, his testimony established the truthfulness of the evidence.

*Id*. at 327.

In other words, this Court concluded that the wrongly-admitted evidence could not possibly have induced the defendant to testify because, once he took the witness stand, the defendant did not attempt to provide an exculpatory explanation for the evidence, unlike the defendant in *Harrison*, who, in response to the improper admission of his confession, denied that he had been attempting a robbery and claimed that the victim's shooting was an accident. *Harrison*, 392 U.S. at 221. Indeed, it appears that the defendant in *Eacret* did not even claim that the wrongly-admitted evidence induced him to testify: at the start of its opinion, this Court noted, "This case presents the unusual situation where with the consent of counsel defendant took the witness stand and judicially admitted under oath that he had committed the offense for which he was charged, but appeals and contends that even so he

was entitled to an error free trial."[11] *Eacret*, 456 S.W.2d at 325. The defendant was thus claiming that *Harrison* stood for the proposition that the improper admission of evidence *automatically* taints a defendant's subsequent testimony, which is certainly not the case.

Like the defendant in *Eacret*, here Appellant did not take the stand to refute, explain, or qualify the evidence obtained as a result of the *Terry* stop. Instead, he took the stand for the purpose of rebutting Officer Reynolds's testimony as to the assault, namely that while she was patting him down he pushed her, which was evidence that he had committed assault of a law enforcement officer. (Tr. 40-41; L.F. 15). He discussed neither the weapon nor the drug charge on direct examination; only on cross-examination did the matter come up. Even then, Appellant did not give any exculpatory response to the charges. Rather, he simply answered, "Yes," to the State's questions of whether he possessed the gun and the marijuana. (Tr. 43). This is not the type of testimony that either *Harrison* or *Fahy* excludes.

Amici argue that this Court's reading of *Harrison* in *Eacret* is implausible. They claim that *Eacret* distinguished *Harrison* on the ground

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[11] In fact, a "defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-232 (1973).

that the defendant in *Eacret* "admitted committing the crime, while in Harrison's testimony he only admitted having been at the scene of the crime." (Am.Br. 9). This is an oversimplification of *Eacret*. In fact, this Court concluded in *Eacret* that the fact that Appellant admitted his guilt on the stand showed that the improperly-admitted evidence did not compel him to testify in the first place, placing him outside *Harrison's* scope. *Eacret*, 456 S.W.2d at 327.

Amici further claim that *Eacret's* interpretation of *Harrison* "may have been . . . plausible . . . in 1970, when the case was still new and the law in this area was still unsettled. Forty-two years later, it is no longer plausible." (Am.Br. 9). They claim, "To our knowledge, no other court in the country has distinguished *Harrison* on this ground." (Am.Br. 9). On the contrary, the Oregon Supreme Court only two years ago ruled that a defendant's trial testimony supports a claim of harmless error where the court can determine from the record that the testimony "did not refute, explain, or qualify the erroneously admitted pretrial statements [or other wrongly-admitted evidence]." *State v. Moore*, 245 P.3d 101, 109 (Or. 2010).[12]

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[12] Amici themselves cite *Moore* in their brief, but not for this proposition. (Am.Br. 7).

While *Harrison* and *Fahy* have modified the *Motes* rule, they have not abolished it altogether. This Court should follow its precedent in *Eacret* and hold that Appellant's testimony admitting to possessing the gun and the marijuana rendered harmless any error that the trial court may have committed in admitting the gun, the marijuana, and Officer Reynolds's testimony into evidence. It certainly cannot be said that the admission of Officer Reynolds's testimony rose to the level of plain error. This Court should reject Appellant's argument to the contrary.

## CONCLUSION

The Court should affirm Appellant's convictions.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 7,116 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on this 25th day of April, 2012, to:

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